Supreme Court, U.S.
FILED

001447 FEB 27 2001

OFFICE OF THE CLERK

No._____

IN THE

Supreme Court of the United States

October Term, 2000

VIRGINIE GSCHWIND, IN HER OWN RIGHT AND ADMINISTRATRIX OF THE ESTATE OF CYRIL GSCHWIND, DECEASED, AND AS PARENT AND NATURAL GUARDIAN OF ALEXANDRA GSCHWIND,

Petitioner,

v.

THE CESSNA AIRCRAFT COMPANY, AND PRATT & WHITNEY CANADA INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Virginie Gschwind respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

BURRUPS PACKARD® / APPELLATE DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-8000

38 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does 28 U.S.C. § 1332(a)(2) require a citizen of the United States on both sides of an action between foreign citizens?

2. Is the conditional dismissal of an action for *forum non conveniens* in the absence of subject matter jurisdiction a clear usurpation of power for purposes of Fed. R. Civ. P. 60(b)(4)?

PARTIES TO THE PROCEEDING BELOW

The following persons and entities were parties before the United States Court of Appeals for the Tenth Circuit: Virginie Gschwind (Appellant) and The Cessna Aircraft Company and Pratt & Whitney Canada Inc. (Appellees). The Cessna Aircraft Company is a subsidiary of Textron Inc.. Pratt & Whitney Canada is a subsidiary of United Technologies Corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW..... i

PARTIES TO THE PROCEEDING BELOW..... ii

TABLE OF AUTHORITIES..... iv

OPINIONS BELOW..... 1

JURISDICTION..... 1

STATUTE AND RULE INVOLVED..... 1

STATEMENT OF THE CASE..... 2

REASONS FOR GRANTING THE WRIT..... 5

ARGUMENT..... 6

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THOSE CASES HOLDING 28 U.S.C. § 1332(a)(2) REQUIRES COMPLETE DIVERSITY, THAT IS, AN UNITED STATES CITIZEN ON BOTH SIDES OF AN ACTION BETWEEN FOREIGN CITIZENS..... 6

II. IMPOSITION OF CONDITIONS UPON A *FORUM NON CONVENIENS* DISMISSAL ABSENT SUBJECT MATTER JURISDICTION IMPERMISSIBLY EXTENDS JURISDICTION AND VOIDS ANY JUDGMENT ENTERED THEREON..... 8

CONCLUSION..... 10

APPENDIX..... 1a

Order of the United States Court of Appeals for the Tenth Circuit dated November 29, 2000..... 1a

Memorandum and Order of the United States District Court for the District of Kansas filed October 4, 1999 10a

Statute and Rule Involved

28 U.S.C. § 1332(a)..... 20a

Fed. R. Civ. P. 60(b)(4)..... 20a

TABLE OF AUTHORITIES

Cases:	*Page*
Allendale Mutual Ins. Co. v. Bull Data Systems, Inc., 10 F.3d 425 (7th Cir. 1993)	5
Cheng v. Boeing Co., 708 F.2d 1406 (9th Cir.), *cert. denied*, 464 U.S. 1017 (1983)	7
Corporation Venezolana de Fomento v. Vintero Sales Corp., 629 F.2d 786 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981)	7
Ed & Fred, Inc. v. Puritan Marine Insurance Corp., 506 F.2d 757 (5th Cir. 1975)	7
Ex parte McCardle, 79 U.S. 506 (1869)	8
Eze v. Yellow Cab Co. of Alexandria, Virginia, Inc., 782 F.2d 1064 (D.C. Cir. 1986)	7
Faysound Ltd. v. United Coconut Chemicals, Inc., 878 F.2d 290 (9th Cir. 1989)	7
Franceskin v. Credit Suisse, 214 F.3d 253 (2d Cir. 2000)	7
Gschwind v. Cessna Aircraft Co., 161 F.3d 602 (10th Cir. 1998)	3
Gschwind v. Cessna Aircraft Co., 232 U.S. 1341 (1999)	3
Gschwind v. Cessna Aircraft Co., 189 F.R.D. 643 (D. Kan. 1999)	4
Gschwind v. Cessna Aircraft Co., 232 F.2d 1342 (10th Cir. 2000)	4
Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947)	9
In re Papandreou, 139 F.3d 247 (D.C. Cir. 1998)	9
Kramer v. Caribbean Mills, Inc., 394 U.S. 823 (1969)	7
Kuehne & Nagel (AG & Co.) v. Geosource, Inc., 874 F.2d 283 (5th Cir. 1989)	7
Mansfield C. & L. M. Ry. Co. v. Swan, 111 U.S. 379 (1884)	8

TABLE OF AUTHORITIES—*(Continued)*

Cases: Page

Montalet v. Murray, 4 Cranch (8 U.S.) 46 (1807)..... 7

Mossman v. Higginson, 4 Dall. (4 U.S.) 12 (1800)..... 7

Mutuelles Unies v. Kroll & Linstrom, 957 F.2d 707 (9th Cir. 1992)..... 7

Preiser v. Newkirk, 422 U.S. 395 (1975)..... 8

Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999) .. 4

Steel Co. v. Citizens for Better Environment, 523 U.S. 83 (1998)..... 8

Strawbridge v Curtiss, 7 U.S. 267 (1806)..... 6

Vallely v. Northern Fire & Marine Ins. Co., 254 U.S. 348 (1920)..... 5

STATUTES

28 U.S.C. § 1254(1)..... 1

28 U.S.C. § 1332 1

28 U.S.C. § 1332(a)(1) 6

28 U.S.C. § 1332(a)(2) 6

28 U.S.C. § 1332(a)(3) 6

28 U.S.C. § 1332(a)(4) 6

28 U.S.C. § 1404(a)..... 3

28 U.S.C. § 1441(b)..... 2

28 U.S.C. § 1602(a)..... 6

RULES OF COURT

Fed. R. Civ. P. 60(b)(4) 1

OPINIONS BELOW

The decision of the court of appeals affirming the district court (App. 1a to 9a) is reported at 232 F.3d 1342 (10th Cir. 2000). The memorandum and order of the district court (App. 10a to 19a) is reported at 189 F.R.D. 643 (D. Kan. 1999).

JURISDICTION

The judgment of the court of appeals was entered on November 29, 2000. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

The statute and rule involved in this case, 28 U.S.C. § 1332(a) and Fed. R. Civ. P. 60(b)(4), appear in the appendix to this petition. (App. 20a).

STATEMENT OF THE CASE

This wrongful death and survival action arises from the fatal crash of a brand new Cessna Caravan 208B aircraft, which occurred on August 16, 1993 near Cannes, France, killing Cyril Gschwind.

Mr. Gschwind was a French national who lived in Belgium with his pregnant wife, a Belgian citizen, and their infant daughter. His widow commenced a wrongful death action in the Court of Common Pleas of Montgomery County, Ohio on August 11, 1995. Named as defendants were The Cessna Aircraft Company (Cessna), a Kansas corporation with its principal place of business in Kansas, Pratt & Whitney Canada, Inc. (Pratt & Whitney Canada), a Canadian corporation with its principal place of business in Canada, and Hartzell Propeller Inc. (Hartzell), an Ohio corporation with its principal place of business in Ohio, Hartzell being one of two manufacturers, along with the McCauley Division of Cessna, which make propellers for the Caravan.

The defendants removed to the United States District Court for the Southern District of Ohio, asserting subject matter jurisdiction pursuant to 28 U.S.C. § 1332, although they did not specify what subsection of the diversity statute was being invoked. In their removal petition, the defendants alleged that, while Hartzell was an Ohio defendant such that the action would not normally be removable pursuant to 28 U.S.C. § 1441(b), in reality the aircraft propellers were not manufactured by Hartzell but were manufactured by McCauley, an unincorporated division of Cessna, a Kansas corporation.

Gschwind moved to remand, raising a defect in the removal procedure under 28 U.S.C. § 1447(c) by virtue of the presence of a resident defendant. The motion was first granted, then ultimately denied by the magistrate judge after a motion for reconsideration was filed by the defendants. Objections were timely filed. The motion for remand and objections were denied as "moot" by the district court after the resident defendant was dismissed as a party.

The defendants moved to dismiss the action for *forum non conveniens* or, in the alternative, for a transfer to the District of Kansas pursuant to 28 U.S.C. § 1404(a). The magistrate judge issued a report recommending that the case not be dismissed for *forum non conveniens* but granting the alternative request to transfer the case to the District of Kansas. The action was then transferred.

Six months after the transfer, the District of Kansas granted the *forum non conveniens* motions and conditionally dismissed the action in an unreported decision.

Gschwind appealed to the United States Court of Appeals for the Tenth Circuit. The *forum non conveniens* dismissal was affirmed by the Tenth Circuit. *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602 (10th Cir. 1998).

Gschwind moved for panel rehearing to set aside the judgment on the ground that the court lacked subject matter jurisdiction given that the plaintiff and one of the defendants "were citizens or subjects of a foreign state" so there was no alienage jurisdiction under 28 U.S.C. § 1332(a)(2) and no other independent basis for subject matter jurisdiction. Rehearing and rehearing *en banc* were denied, without comment, on November 10, 1998. A petition for writ of certiorari was denied on May 17, 1999. *Gschwind v. Cessna Aircraft Co.*, 232 U.S. 1341 (1999).

Shortly thereafter, Gschwind filed a motion to vacate the judgment pursuant to Fed. R. Civ. P. 60(b)(4), urging the district court to set aside the judgment for a total want of jurisdiction. Neither defendant disputed the lack of subject matter jurisdiction, though they both opposed the motion.

Pratt & Whitney Canada took the position that subject matter jurisdiction had been conclusively settled. Cessna took the position that Gschwind "unsuccessfully challenged" subject matter jurisdiction on appeal even though it previously told this Court that certiorari should be denied because subject matter jurisdiction was "an issue that was not briefed, argued, or decided below" and "the Tenth Circuit decision does not even address the jurisdictional issue."

The district court denied the 60(b)(4) motion. In finding the judgment to have been erroneous and voidable, rather than void, the district court stated that it "agree[d]. . .that if the court did not have subject matter jurisdiction over the action pursuant to diversity jurisdiction under 28 U.S.C.§1332, its dismissal of plaintiff's case with conditions on grounds of *forum non conveniens* was an erroneous exercise of jurisdiction." *Gschwind v. Cessna Aircraft Co.,* 189 F.R.D. 643 (D. Kan. 1999). However, the court concluded the lack of jurisdiction did not void the judgment:

> Diversity jurisdiction "rests on statutory interpretation, not constitutional command." *Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, ____, 119 S. Ct. 1563, 1570 (1999). If a federal court exercises jurisdiction on the erroneous assumption of diversity jurisdiction, 28 U.S.C. § 1332 is offended, not the Constitution. *See id.* Thus, assuming this court was without jurisdiction under the diversity statute, its exercise (and the Tenth Circuit's exercise) of jurisdiction was a mere erroneous interpretation of 28 U.S.C. § 1332, not a clear usurpation of constitutionally granted authority.

189 F.R.D. at 647. Chastising Gschwind for "miss[ing] the chance to catch a ride on the appellate court's boat to the land of reversal and remand," the court denied the Rule 60(b)(4) motion to vacate the judgment. *Id.* at 649.

Gschwind again appealed to the Tenth Circuit. In affirming, the court of appeals "assumed for the sake of argument that the requirements of [28 U.S.C.] § 1332 were not met because Ms. Gschwind was not joined by a United States citizen." *Gschwind v. Cessna Aircraft Co.,* 232 F.2d 1342, 1345 (10th Cir. 2000). The court of appeals further acknowledged "the district court could have exercised jurisdiction pursuant only to § 1332(a)(2), if at all." 232 F.3d at 1345. Though noting "the circuits that have considered the issue read § 1332(a)(2) to require United States citizens on both sides of an action between foreign citizens," the court of appeals nevertheless asserted this interpretation [to be] far from clear on the face of § 1332(a)(2)." 232 F.3d at 1345 (citations omitted).

The court of appeals therefore characterized the exercise of jurisdiction to be an "erroneous interpretation" of subject matter jurisdiction and voidable, rather than void for lack of subject matter jurisdiction. 232 F.3d at 1346. In reaching this conclusion, the court of appeals emphasized that "[t]he express language of § 1332(a)(2) does not require a United States citizen on both sides of an action between foreign citizens." *Id.* (citing *Allendale Mutual Ins. Co. v. Bull Data Systems Co.*, 10 F.3d 425, 428) (7th Cir. 1993). The court of appeals concluded that the district court did not impermissibly extend its jurisdiction in ordering the *forum non conveniens* dismissal but "did nothing more than erroneously exercise its jurisdiction in this particular case." 232 F.3d at 1346.

Finally, the court of appeals distinguished *Vallely v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348 (1920), because "the jurisdictional statute in *Vallely* plainly excluded insurance companies from jurisdiction, [while] § 1332 does not on its face exclude actions brought by a foreign citizen against a foreign and United States citizen." 232 F.3d at 1347-48.

REASONS FOR GRANTING THE WRIT

For two centuries, the Court has interpreted diversity jurisdiction to require complete diversity. The Court has also cautioned that a pronouncement on the merits when a court has no jurisdiction to do so an improper extension of jurisdiction and usurpation of jurisdictional power.

Congress did not grant diversity jurisdiction over this entire category of cases, suits between aliens. The Tenth Circuit's decision conflicts with those circuits which have expressly decided the issue whether U.S. citizens are required on both side of a controversy between foreign citizens. Condition forum conveniens dismissals, absent an initial determination of jurisdiction conflict with the Court's teachings and a contrary decision by the District of Columbia Circuit.

This case raises important questions of jurisdiction and the power of federal courts to decline jurisdiction, if it exists, or to determine whether it has jurisdiction in the first instance. The Court should grant review to resolve these questions.

ARGUMENT

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THOSE CASES HOLDING 28 U.S.C. § 1332(a)(2) REQUIRES COMPLETE DIVERSITY, THAT IS, AN UNITED STATES CITIZEN ON BOTH SIDES OF AN ACTION BETWEEN FOREIGN CITIZENS.

The defendants removed this action "pursuant to 28 U.S.C. § 1332." Section 1332 affords diversity jurisdiction in the following situations only:

1. in suits between "citizens of different States" (28 U.S.C. § 1332(a)(1)); *or*

2. in suits between "citizens of a State and citizens or subjects of a foreign state" (28 U.S.C. § 1332 (a)(2)); *or*

3. in suits between "citizens of different states and in which citizens or subjects of a foreign state are additional parties" (28 U.S.C. § 1332(a)(3)); *or*

4. in suits between a "foreign state, defined in [28 U.S.C. § 1602(a)], as plaintiff and a citizen of a State or of different States" (28 U.S.C. § 1332(a)(4)).

The only possible basis of diversity jurisdiction is 28 U.S.C. § 1332(a)(2), affording jurisdiction in cases between "citizens of a State and citizens or subjects of a foreign state," which the Tenth Circuit noted in its opinion. 232 F.3d at 1345. "Section 1332 has been interpreted to require 'complete diversity.'" *Ruhrgas v. Marathon Oil Co.,* 526 U.S. 574, 580 n.2 (1999) (citing *Strawbridge v. Curtiss,* 7 U.S. 267 (1806)). *See also* 526 U.S. at 580 n.2 ("The foreign citizenship of defendant Ruhrgas, a German Ruhrgas, a German corporation, and plaintiff Norge, a Norwegian corporation, rendered diversity incomplete").

While the Court has not had occasion to specifically address the parameters of 28 U.S.C. § 1332(a)(2), it has long recognized that the federal courts have no diversity jurisdiction over suits between aliens, although there may be other

jurisdictional bases. *E.g., Montalet v. Murray,* 4 Cranch (8 U.S.) 46, 47 (1807); *Mossman v. Higginson,* 4 Dall. (4 U.S.) 12, 13 (1800). The Court likewise has described 28 U.S.C. § 1332(a)(2) as "diversity jurisdiction. . .arising from the alienage of one of the parties." *Kramer v. Caribbean Mills, Inc.,* 394 U.S. 823, 829 (1969) (emphasis supplied).

The circuits which have squarely addressed the question have held that alienage diversity jurisdiction under 28 U.S.C. § 1332(a)(2) may not be invoked in a suit such as this one because the presence of an alien on both sides of the action destroys complete diversity: "Diversity jurisdiction does not encompass foreign plaintiffs suing foreign defendants." *Mutuelles Unies v. Kroll & Linstrom,* 957 F.2d 707, 711 (9th Cir. 1992) (quoting *Cheng v. Boeing Co.,* 708 F.2d 1406, 1412 (9th Cir.), *cert. denied,* 464 U.S. 1017 (1983)).

The Second, Fifth, Ninth, and District of Columbia Circuits have all held that the presence of foreign citizen on both sides of an action defeats complete diversity. *See, e.g., Franceskin v. Credit Suisse,* 214 F.3d 253, 258 (2d Cir. 2000) (no diversity where citizen of Argentina sued British bank and Swiss bank with New York offices); *Faysound Ltd. v. United Coconut Chemicals, Inc.,* 878 F.2d 290, 295 (9th Cir. 1989) (presence of Swiss defendant, along with New York defendant, in action by Hong Kong plaintiff defeated jurisdiction because diversity was not complete); *Kuehne & Nagel (AG & Co.) v. Geosource, Inc.,* 874 F.2d 283, 290-91 (5th Cir. 1989) (no diversity jurisdiction existed to entertain action by West German corporation against Texas corporation and Cayman Islands corporation); *Eze v. Yellow Cab Co. of Alexandria, Virginia, Inc.,* 782 F.2d 1064, 1065 (D.C. Cir. 1986) (citizens of Nigeria could not maintain diversity action against citizen of Ghana and Virginia cab company because diversity was not complete); *Ed & Fred, Inc. v. Puritan Marine Insurance Corp.,* 506 F.2d 757, 758 (5th Cir. 1975) (complete diversity absent in action by citizen of Netherlands Antilles against two defendants, one a citizen of Massachusetts, the other a citizen of Bermuda). *Cf. Corporacion Venezolana de Fomento v. Vintero Sales Corp.,* 629 F.2d 786, 790 (2d Cir. 1980) (no diversity where Venezuelan gov-

ernmental entity sued Swiss corporation and New York corporation), *cert. denied,* 449 U.S. 1080 (1981).

The contrary position is that suggested by the Seventh Circuit in *Allendale Mutual Ins. Co. v. Bull Data Systems, Inc.,* 10 F.3d 425, 428 (7th Cir. 1993), which questions the "sense" of the line of cases holding that § 1332(a)(2) "does not permit a suit between foreigners and a mixture of citizens and foreigners." The court of appeals here found *Allendale* persuasive and perceived the supposed lack of clarity in the statute to mean the judgment was voidable rather than void, seizing upon the lack of an express exclusion in the statute requiring complete diversity in suits between aliens to be determinative. 232 F.3d at 1345, 1346.

Subject matter jurisdiction is to be strictly, not expansively, construed. The court here "assumed for sake of argument" that there was no subject matter jurisdiction. The Court has instructed that a federal court may not hypothesize subject matter jurisdiction on the merits, *Steel Co. v. Citizens for Better Environment,* 523 U.S. 83, 93-94 (1998), nor may it hypothesize jurisdiction for purposes of determining whether the exercise of jurisdiction was void or voidable.

II. IMPOSITION OF CONDITIONS UPON A *FORUM NON CONVENIENS* DISMISSAL ABSENT SUBJECT MATTER JURISDICTION IMPERMISSIBLY EXTENDS JURISDICTION AND VOIDS ANY JUDGMENT ENTERED THEREON.

"[T]he first and fundamental question is that of jurisdiction, first of this [C]ourt, and then of the court from which the record comes." *Mansfield C. & L. M. Ry. Co. v. Swan,* 111 U.S. 379, 382 (1884). "[J]urisdiction is power to declare the law." *Ex Parte McCardle,* 79 U.S. 506, 510 (1869).

A court can determine the merits of a controversy only if jurisdiction exists at all stages of the proceeding. *Preiser v. Newkirk,* 422 U.S. 395, 401 (1975). There was no independent basis for subject matter jurisdiction at the time of removal in

1995 and there remains none to this day. There was no "error" in the determination of a quasi-jurisdictional fact; there was never jurisdiction.

Even if, standing alone, the lack of U.S. citizens on both sides of the controversy was not sufficient to make the judgment void pursuant to Rule 60(b)(4), the question remains whether the district court usurped its jurisdictional authority by imposing conditions upon the *forum non conveniens* dismissal when it didn't have jurisdiction over the action. The court of appeals held it did not. 232 F.3d at 1346.

This holding directly conflicts with *In re Papandreou,* 139 F.3d 247 (D.C. Cir. 1998), *cited with approval* in *Ruhrgas, supra,* 526 U.S. at 584-85. In *Papandreou*, the District of Columbia Circuit recognized that the federal courts have the power to dismiss on issues other than those related to the merits, including *forum non conveniens*, without first reaching jurisdictional questions, and in doing so make "no assumption of law declaring power that violates the separation of powers principles" underlying the Court's decisions in *Mansfield* and *Steel Co.* 139 F.3d at 255. However, the court also cautioned:

> Any such forum non conveniens dismissal could not, however, be subject to conditions, *e.g.,* a condition that defendants promise to submit to the jurisdiction of another court, for exaction of such a condition would appear inescapably to constitute an exercise of jurisdiction.

Id. at 256 n.6. The district court exacted such conditions here, *ultra vires* its authority.

"The doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue." *Gulf Oil Corp. v. Gilbert,* 330 U.S. 504 (1947). The Tenth Circuit not only has held *forum non conveniens* may apply in the absence of jurisdiction but it has authorized an unauthorized exercise of jurisdiction. The Court's intervention is warranted.

CONCLUSION

For the reasons set forth above, petitioner urges that the petition for writ of certiorari be granted.

Respectfully submitted,

ARTHUR ALAN WOLK*
WOLK & GENTER
1710-12 Locust Street
Philadelphia, PA 19103
(215) 545-4220

Counsel for Petitioner

**Counsel of Record*

Dated: February 27, 2001